



November 20, 2001

Mr. John Steiner  
Division Chief  
City of Austin - Law Department  
P.O. Box 1546  
Austin, Texas 78767-1546

OR2001-5374

Dear Mr. Steiner:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 154425.

The City of Austin (the "city") received a request for a copy of the winning proposal for solicitation number VC98300026.<sup>1</sup> You state that the information that has not been marked as proprietary information has been released to the requestor. You claim that the submitted information may be excepted from disclosure pursuant to sections 552.101 and 552.110 of the Government Code.<sup>2</sup> You make no arguments and take no position as to whether the submitted information is excepted from disclosure. You state, and provide documentation showing, that you notified the third party whose proprietary information may be implicated by the request, namely TriTech Software Systems, Inc./GTE Network Services ("TriTech/GTE"), of the request for information. *See* Gov't Code § 552.305 (permitting

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<sup>1</sup> Pursuant to section 552.303 of the Government Code, our office notified the city that the documents submitted by the city to our offices were the winning proposals for solicitation number VC003000010, not solicitation number VC983000026. Thus, we requested that the city submit the documents that are responsive to the request for the winning proposal for solicitation number VC983000026. The city responded to that section 552.303 notice by advising us that it understood the requestor to be seeking the ultimately successful bid for the computer-aided dispatch system, that solicitation number VC983000026 was cancelled, that the request for proposal pertaining to that system was rebid as solicitation number VC003000010, and that the contract under solicitation number VC003000010 was ultimately awarded to TriTech Software Systems/GTE Network Services. Accordingly, we rule on the submitted information under the presumption that it is responsive to the request for information.

<sup>2</sup> Although you claim that the submitted information may be excepted from disclosure pursuant to section 552.101 of the Government Code, you did not provide us with any reasons why section 552.101 independently applies to the information. *See* Gov't Code § 552.301(e)(1)(A). Accordingly, we do not address your section 552.101 claim with regard to the submitted information.

interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). We have considered the claimed exceptions and have reviewed the submitted information.

TriTech/GTE responded to the city's section 552.305 notice by claiming that the submitted information is excepted from disclosure pursuant to section 552.110 of the Government Code. Section 552.110(a) protects trade secrets of private parties. The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, which holds a "trade secret" to be:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business. . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). If a governmental body takes no position with regard to the application of the "trade secrets" branch of section 552.110 to requested information, we accept a private person's claim for exception as valid under that branch if that person establishes a prima facie case for exception and no one submits an argument that rebuts the claim as a matter of law.<sup>3</sup> *See* Open Records Decision No. 552 at 5 (1990).

Section 552.110(b) excepts from disclosure "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial

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<sup>3</sup>The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: "(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and other involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others." RESTATEMENT OF TORTS, § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

competitive harm to the person from whom the information was obtained.” An entity will not meet its burden under section 552.110(b) by a mere conclusory assertion of a possibility of commercial harm. *Cf. National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). The governmental body or interested third party raising section 552.110(b) must provide a specific factual or evidentiary showing that substantial competitive injury would likely result from disclosure of the requested information. *See* Open Records Decision Nos. 639 at 4 (1996) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure).

Based on our review of TriTech/GTE’s arguments and the information that TriTech/GTE seeks to withhold from disclosure, we conclude that the city must withhold the portions of this information that we have marked as TriTech/GTE’s trade secret information pursuant to section 552.110(a) of the Government Code. The city must also withhold from disclosure the portions of the submitted information that TriTech/GTE seeks to withhold that we have marked pursuant to section 552.110(b) of the Government Code, since we conclude that TriTech/GTE has sufficiently demonstrated that the release of this commercial or financial information would cause substantial competitive harm to TriTech/GTE. However, the city may not withhold the remaining information that TriTech/GTE claims to be excepted under section 552.110, as we do not find that any of it is protected from disclosure under that exception.<sup>4</sup> *See* Open Records Decision Nos. 319 (1982) (finding information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110).

We note that portions of the remaining submitted information that TriTech/GTE does not claim to be excepted from disclosure are excepted pursuant to section 552.137 of the Government Code. The Seventy-seventh Legislature recently added section 552.137 to chapter 552 of the Government Code. This new exception makes certain e-mail addresses confidential.<sup>5</sup> Senate Bill 694, as passed May 14, 2001, signed by the Governor May 26, 2001, and made effective immediately, provides in relevant part:

**Sec. 552.137. CONFIDENTIALITY OF CERTAIN E-MAIL ADDRESSES.**

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<sup>4</sup> We note that although TriTech/GTE argues that Section 13 (Cost Proposal) of the winning proposal is excepted from disclosure under section 552.110, we did not receive any information from the city pertaining to section 13 of the proposal. Accordingly, this ruling does not address whether any portion of section 13 may be withheld from disclosure and is, thus, limited to the information submitted as responsive by the city.

<sup>5</sup> House Bill 2589, which also makes certain e-mail addresses confidential, took effect on September 1, 2001. *See* Act of May 22, 2001, 77th Leg., R.S., H.B. 2589, § 5 (to be codified at Gov’t Code § 552.136). The language of section 552.136, as added by House Bill 2589, is identical to that of section 552.137.

(a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Act of May 14, 2001, 77th Leg., R.S., S.B. 694, § 1 (to be codified at Gov't Code § 552.137). Accordingly, the city must withhold all email addresses in the remaining submitted information from disclosure pursuant to section 552.137 of the Government Code that were provided for the purpose of communicating electronically with the city. The rest of the submitted information not already addressed, however, must be released to the requestor.

In summary, the city must withhold the portions of the submitted information that we have marked as TriTech/GTE's trade secret information pursuant to section 552.110(a) of the Government Code. The city must also withhold from disclosure the portions of the submitted information that TriTech/GTE seeks to withhold that we have marked pursuant to section 552.110(b) of the Government Code. The city must withhold all email addresses in the remaining submitted information from disclosure pursuant to section 552.137 of the Government Code that were provided for the purpose of communicating electronically with the city. The rest of the submitted information not already addressed, however, must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records;

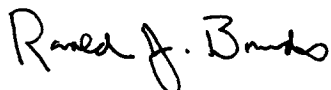
2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds  
Assistant Attorney General  
Open Records Division

RJB/seg

Ref: ID# 154425

Enc. Marked documents

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